PD-1279-19
COURT OF CRIMINAL APPEALS
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No. PD-1279-19

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
1/9/2020
DEANA WILLIAMSON, CLERK

RAMIRO CASTILLO-RAMIREZ, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Cause 16-CR-271, Starr County
and No. 04-18-00514-CR, San Antonio Court of Appeals

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STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

- The parties to the trial court's judgment are the State of Texas and Appellant, Ramiro Castillo-Ramirez.

- The trial judge was Hon. Martin Chiumimatto, Visiting Judge, sitting for the 381st Judicial District Court, Starr County, Texas.

- Counsel for Appellant at trial was Jesus "Chuy" Alvarez, 501 N. Britton Ave., Rio Grande City, Texas 78582.

- Counsel for Appellant on appeal were Linda Gonzalez, Chief Public Defender, and Jessica Anderson, First Asst. Public Defender, Texas RioGrande Legal Aid, Inc., 310 East Mirasoles Street, Rio Grande City, Texas 78582.

- Counsel for the State at trial were Gilberto Hernandez-Solano and Alex Barrera, Assistant District Attorneys, 401 N. Britton Ave., Starr County Courthouse, 3rd Floor, Suite 417, Rio Grande City, Texas 78582.

- Counsel for the State before the Court of Appeals were Gilberto Hernandez-Solano (original brief) and Andrew Whitlock (motion for rehearing), Assistant District Attorneys, Starr County Courthouse, 401 N. Britton Ave., Suite 417, Rio Grande City, Texas 78582.

- Counsel for the State before this Court is Emily Johnson-Liu, Assistant State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

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* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Jury charges should be correct. They perform an essential function in guiding deliberations and ensuring a fair trial. But not every mistake in the charge impacts the trial. Here, the court of appeals failed to realistically assess a mistake's importance, misunderstood the defensive theory, and needlessly remanded an aggravated sexual assault case for a retrial. The State Prosecuting Attorney respectfully requests review.

STATEMENT REGARDING ORAL ARGUMENT

The State does not request oral argument.

STATEMENT OF THE CASE

Appellant was indicted for aggravated sexual assault of an elderly individual, specifically by means of his sexual organ.[1] The jury charge was not so limited.[2] Following his conviction, Appellant raised this error for the first time on appeal. The court of appeals found it egregiously harmful.[3]

STATEMENT OF PROCEDURAL HISTORY

The court of appeals issued its opinion on August 21, 2019. The State timely filed a motion for reconsideration en banc, which was denied November 26, 2019. This Court granted the State an extension until January 27, 2020, to file this petition.

GROUND FOR REVIEW

> Can error in a sexual-assault charge—which fails to specify that the defendant used his penis—be harmful when there was no evidence or claim that he used anything else?

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[1] 3 RR 37.

[2] 5 RR 194-200.

[3] *Castillo-Ramirez v. State*, 2019 WL 3937270, No. 04-18-00514-CR (Tex. App.—San Antonio, Aug. 21, 2019, reh'g denied Nov. 26, 2019) (not designated for publication).

ARGUMENT

The jury charge was erroneous. The indictment was more specific than the statute—it alleged aggravated sexual assault with the defendant's sexual organ—and the charge should have been just as specific. But this error was entirely harmless. The only evidence of sexual assault was that it was committed by the defendant's sexual organ, and, contrary to the court of appeals's holding, the error had no effect on Appellant's defensive theory.

Any penetration was done with a penis.

Appellant and the victim, who was thirty years his senior, had a prior sexual relationship that ended some months earlier.[4] On the day of the sexual assault, Appellant helped the victim move some furniture. The victim testified that Appellant forced her into a bedroom, anally raped her, and then vaginally raped her.[5] He smelled like alcohol. He removed their clothes. She said, consistently, that he used his penis.[6] She told this to the SANE.[7] The victim had anal lacerations and vaginal

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[4] 3 RR 65-67.

[5] 3 RR 91-94.

[6] She said she "felt his thing in there . . . what the man have," that it was "his private part," which she called "cositas." 3 RR 92.

[7] 4 RR 95-96, 102.

abrasions that the SANE said were consistent with her account.[8] Semen was collected from the victim's vagina, and DNA evidence showed Appellant was far and away the likely contributor.[9]

After the assault, Appellant told a store clerk who knew the victim that he was going to jail and, by way of explanation, said, "I just fucked [the victim] through the ass."[10] He told a transport officer who knew nothing about the offense specifics, "that's what she deserves because she didn't pay [me]."[11]

The State proceeded to trial on its single sexual-assault allegation: penetration of the victim's anus "by [Appellant's] sexual organ."[12] Evidence of both vaginal and anal rapes were admitted. The State's theory and evidence was that Appellant anally and then vaginally penetrated the victim with his penis, perhaps because he was drunk and suspected she was having sex with another man.[13] Appellant did not

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[8] 4 RR 98-100, 104.

[9] 5 RR 158-59. No semen was found on the anal secretions. 4 RR 100; 5 RR 127-30, 136.

[10] 4 RR 125.

[11] 5 RR 94-95.

[12] CR 9.

[13] 3 RR 88-89 (victim's testimony of his threats that "this" is what would happen to her every time she had sex with someone else); 4 RR 95-96 (victim's statement to SANE that she thought he was drunk).

testify or offer any contrary witnesses. There was no evidence, argument, or assertion that the victim was penetrated by anything other than Appellant's penis.

Without evidence or even assertion of an alternative instrumentality, failure to limit the jury charge to "sexual organ" was harmless.

Error in submitting an unsupported, alternative means is frequently harmless because jurors would have ignored it and convicted for the means supported by evidence. *Black v. State*, which involved an unsupported parties instruction, is a prime example.[14] This Court criticized the dissent for finding harm from a "logical possibility" that the jury convicted Black as a party because that approach restricts its view of harm only to the charge itself (rather than the context of the entire record), returns to automatic-reversal of pre-*Almanza* case law, and presumes the jury acted irrationally.[15]

The court of appeals's holding that the charge error "created the significant possibility" of a conviction for a means other than Appellant's sexual organ suffers these same flaws.[16] It is not the right standard. Harm must be actual, not just a

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[14] *Black v. State*, 723 S.W.2d 674, 675 n.2 (Tex. Crim. App. 1986).

[15] *Id.*

[16] *Castillo-Ramirez*, 2019 WL 3937270, at *3.

significant possibility.[17] Here both the charge and the prosecutor admonished jurors not to consider anything not in evidence.[18] There is no reason to think they did.

The defense did not contest the "means" the court of appeals thought it did.

The court of appeals found egregious harm because, it asserted, the means of penetration was contested throughout trial, a focal point of counsel's closing argument, and a specific allegation that Appellant had "built his defensive theory" around.[19] This was true, but not how the court of appeals thinks: the contested means was about whether the State proved anal (as opposed to vaginal) penetration—not whether Appellant had used his penis or something else.

The defensive theory was two-fold: (1) the victim fabricated the sexual assault allegation,[20] or (2) if a sexual assault occurred, it was vaginal—not anal.[21] It is most

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[17] *See Chambers v. State*, 580 S.W.3d 149, 154 (Tex. Crim. App. 2019), reh'g denied (Aug. 21, 2019) (requiring "actual—rather than merely theoretical—harm").

[18] 5 RR 196 (jury charge); 5 RR 228 (closing argument).

[19] *Castillo-Ramirez*, 2019 WL 3937270, at *3.

[20] 3 RR 111, 4 RR 30-31 (questioning victim on her timeline of events); 4 RR 53, 58 (no evidence of a struggle in bedroom photos); 4 RR 70-71 (whether she framed Appellant).

[21] 4 RR 73-75 (eliciting that victim did not remember telling SANE she'd been penetrated anally and suggesting if it was not remembered that it did not happen); 5 RR 135, 162 (emphasizing no semen on anal swabs and that forensic experts could not corroborate penetration of the victim's anus); 5 RR 167 (moving for directed verdict because of lack of physical evidence or expert opinion that Appellant penetrated the victim's anus).

evident in defense counsel's closing argument that the defense was relying on the specifics of *anal penetration* in the indictment, not sexual organ:

> Let's not get away from what the charge is . . . . the charge is not the vagina. . . . It's talking about anus. Do not lose focus . . . . They can bring charges because [the prosecutor] thinks [Appellant] screwed through the vagina. Tomorrow, they [the State] can do that. Today—today, the charge is this. Do not get sidetracked by what the charge is. . . . there's not a single one, not a single page in here [in the jury charge] that . . . talks about vagina. It talks about anus…[22]

Counsel pointed out that "anus" was mentioned six times in the charge. He reiterated, "There's no penetration on the anus. None. None. No blood. None. No—no—no—sperms. None. No fluids. No DNA from [Appellant]."[23]

To be sure, the defense asked questions to cast doubt on whether penial penetration occurred.[24] But this fit within the larger defense that none of the elements occurred and that the victim fabricated the allegations, not that the defense was relying on the State's choice of the wrong (or a less-supported-by-the-evidence) instrumentality.

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[22] 5 RR 216.

[23] 5 RR 223.

[24] 4 RR 75-76 (asking victim whether, at her age, a penis could have gone into her vagina without lubrication); 4 RR 105 (asking SANE whether the defendant could have achieved erection if, as the victim claimed, she had grabbed his testicles); 4 RR 116 (asking SANE whether wiping too hard with "bad" toilet paper can cause anal lacerations); 5 RR 135 (emphasizing that no semen was detected on the anal swabs, only the vaginal ones).

The court of appeals also held that Appellant was deprived of his viable defense theory when the charge did not make the means he relied on a requirement for conviction.[25] Again, the court of appeals confused one means by which the offense was committed (anal penetration) with another (use of his penis). Only the former was part of the defensive theory, and only the latter was omitted from the jury charge.[26] The court of appeals erred by conflating the two.

The court of appeals alleges the jury charge error affected the very basis of the case, that Appellant "attest[ed] he did not penetrate the complainant's anus with his sexual organ" and "presented evidence" in reliance on the allegation of sexual assault by sexual organ.[27] This was misleading at best. Appellant did not testify, and the defense did not present a case.[28] The court of appeals got the record very wrong.

"By his sexual organ" is not even a statutory manner and means.

The court of appeals erred by failing to recognize that the charge's omission of "by his sexual organ" was only an omission of a factual averment, not a statutory

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[25] *Castillo-Ramirez*, 2019 WL 3937270, at *3.

[26] The jury charge properly restricted the offense to anal penetration. 5 RR 199, line 9 (accusation), lines 15, 20 (abstract), lines 3, 7 (definitions), 200, line 18 (application paragraph).

[27] *Castillo-Ramirez*, 2019 WL 3937270, at *3.

[28] 5 RR 169.

means. The only statutory provision for anal rape of an adult is Penal Code § 22.021(a)(1)(A)(i), which prohibits non-consensual penetration of the anus "by any means."[29] Because it is non-statutory, a variance in proof from the specific indictment allegation of sexual organ would not necessarily have been incorporated into the hypothetically correct charge for sufficiency purposes.[30] While this is not a sufficiency case, it suggests the omission here is remediable. Even if it had been statutory, it can still be harmless error to omit an undisputed element from the jury charge.[31]

The court of appeals expressed concern that the jury may not have "unanimously" agreed on "sexual organ."[32] Whatever notice or right-to-grand-jury

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[29] *Cf.* Tex. Penal Code § 22.021(a)(1)(A)(i) (penetrating the victim's anus by any means without consent) *with* (a)(1)(A)(iii) (causing victim's sexual organ, without consent, to penetrate the *defendant's* anus).

[30] *See Johnson v. State*, 364 S.W.3d 292, 298 (Tex. Crim. App. 2012) (setting out three categories of variances: (1) statutory, which are always material; (2) non-statutory that describe the allowable unit of prosecution, which are sometimes material; and (3) immaterial, non-statutory, which are never incorporated into the hypothetically correct charge); *see also Hernandez v. State*, 556 S.W.3d 308, 327 (Tex. Crim. App. 2017) (manner and means that do not define allowable unit of prosecution are not material and thus not incorporated into hypothetically correct charge).

[31] *See Niles v. State*, 555 S.W.3d 562, 571 (Tex. Crim. App. 2018), reh'g denied (Sept. 12, 2018) (citing *Neder v. United States*, 527 U.S. 1, 9 (1999) (holding that such error is subject to harmless error review)).

[32] *Castillo-Ramirez*, 2019 WL 3937270, at *3.

issues may arise from submission of a means not included in the indictment, it does not implicate the right to a unanimous verdict. If penetration by the defendant's finger, for example, had originally been alleged as an alternative means, the defense could not require jurors be unanimous about the means of penetration. Even if they disagreed, they still would have been unanimous on all the elements.[33]

Noticing, but not correcting, the charge error before it was read to the jury underscores its insignificance.

After both parties approved the jury charge, defense counsel objected that a PowerPoint slide of the elements that the State proposed to use during closing argument included the phrase "by any means" rather than "by [Appellant's] sexual organ."[34] As part of that discussion, both parties acknowledged that page four of the charge also included the phrase "by any means."[35] The State removed "by any means" from the slide but the defense did not attempt to fix the jury charge when it still could have.[36] Evidently, the error was not that bothersome. The court of appeals

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[33] TEX. PENAL CODE § 22.021(a)(1)(A)(i) (permitting anal penetration to be "by any means"); *Jourdan v. State*, 428 S.W.3d 86, 96 (Tex. Crim. App. 2014) ("The jury was not required to reach unanimity with respect to whether the appellant penetrated [the victim] with his penis or his finger during [the penetration of a single orifice of a single victim].")

[34] 5 RR 186.

[35] 5 RR 186-87; CR 67 ("Relevant Statutes" section).

[36] TEX. CODE CRIM. PROC. art. 36.14 (providing that counsel shall object to the jury

erred in not factoring this into harm.

The court's analysis of the whole charge and record overlooked still more.

The court of appeals's harm analysis omitted several other important factors. First, it under-appreciated the importance of the "accusation" section of the charge. Because this section told the jury the specific indictment allegation that Appellant used his sexual organ, and the verdict form said that the jury found the Appellant guilty "as charged in the indictment,"[37] the court of appeals should have had confidence the jury found all of the allegations—including that Appellant used his sexual organ—beyond a reasonable doubt.

The court's harm analysis also failed to appreciate that only in the abstract instructions did the jury charge include the phrase "by any means."[38] Certainly, the application paragraph was not limited to "by the defendant's sexual organ," and should have been. But for all the court of appeals' talk that the charge enlarged on the indictment theory, the application paragraph did not emphasize that all means

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instructions "[b]efore [the] charge is read to the jury").

[37] 5 RR 202; CR 66 (accusation in charge), 70 (verdict form).

[38] 5 RR 199, lines 15, 20 (abstract tracks statutory "by any means"), 200, lines 18-20 (application paragraph just says "penetration of the anus" without "by any means" or any other means); CR 67.

were on the table by saying "by any means."[39]

This was even more significant because both the prosecutor and defense counsel told the jury the proper law during closing.[40]

Conclusion

This was a trial about a rape in the traditional sense. If the victim was penetrated, it was by Appellant's penis. And there was no danger he was convicted for penetrating her with anything else. Appellant did not bank his defense on that specific means of penetration, and nothing else shows the mistake in the charge mattered. This Court should intervene and find the error harmless.

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[39] 5 RR 200; CR 67 ("Application of Law to Facts").

[40] 5 RR 205 (prosecutor told jurors it had to prove Appellant "caused the penetration of the anus of [the victim] by the defendant's sexual organ"), 222 (defense argued indictment "doesn't say that I raped you by putting my finger up your butt. It doesn't say if I put a pen up your butt. . . . It doesn't say none of that. It says the sexual organ of a person. Okay. So those are the things you have to do.").

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals grant this petition, reverse the judgment of the court of appeals, and affirm the trial court's judgment and sentence.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to Microsoft Word's word-count tool, this document contains 2,446 words, exclusive of the items excepted by Tex. R. App. P. 9.4(i)(1).

/s/ Emily Johnson-Liu
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CERTIFICATE OF SERVICE

The undersigned certifies that on this 7th day of January 2020, the State's Petition for Discretionary Review was served electronically on the parties below.

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APPENDIX

Court of Appeals's Opinion

2019 WL 3937270
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.

DO NOT PUBLISH
Court of Appeals of Texas, San Antonio.

Ramiro CASTILLO-RAMIREZ, Appellant
v.
The STATE of Texas, Appellee

No. 04-18-00514-CR
|
Delivered and Filed: August 21, 2019

From the 381st Judicial District Court, Starr County, Texas, Trial Court No. 16-CR-271, Honorable Martin Chiuminatto, Judge Presiding

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Sitting: Rebeca C. Martinez, Justice, Beth Watkins, Justice, Liza A. Rodriguez, Justice

MEMORANDUM OPINION

Opinion by: Rebeca C. Martinez, Justice

***1** Ramiro Castillo-Ramirez ("Ramirez") was convicted by a jury for aggravated sexual assault. On appeal, Ramirez argues he was: (1) harmed by jury charge error; (2) deprived of his constitutional right to confront a witness; and (3) denied effective assistance of counsel at trial. Ramirez also argues the trial court erred in admitting certain photos even though the State failed to lay a proper foundation. We only address the jury charge issue because it is dispositive in the outcome of this appeal.

BACKGROUND

On July 29, 2016, Ramirez was hired by the complainant, a seventy-one-year-old woman, to move furniture. The complainant alleged the appellant forced her into the bedroom during the move and sexually assaulted her by putting "his thing" into her "colon." Ramirez was later charged with aggravated sexual assault.

In the indictment, the State alleged Ramirez "intentionally or knowingly cause[d] the penetration of the anus of [the complainant], a person who was then and there an elderly individual, *by defendant's sexual organ*, without the consent of [the complainant]." (emphasis added). Conversely, the jury charge authorized the jury to convict Ramirez if it determined he penetrated the anus of the complainant "*by any means*," beyond a reasonable doubt. (emphasis added). The jury convicted Ramirez of aggravated sexual assault based on these instructions. Ramirez appeals.

JURY CHARGE

A claim of jury charge error is governed by the procedures set forth in *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985). When reviewing charge error, an appellate court must proceed through a two-step review: (1) the court must determine whether an error actually exists in the charge; and (2) the court must determine whether sufficient harm resulted from the charging error to require reversal. *Abdnor v. State*, 871 S.W.2d 726, 731–32 (Tex. Crim. App. 1994).

Once an appellate court determines there is jury charge error, the level of harm to require reversal depends on whether the appellant preserved the error at trial. *Id.* at 732. Where there has been a timely objection made at trial, an appellate court will reverse if there is "some harm." *Id.* However, when, as here, the defendant fails to object to the jury charge, an appellate court will reverse only if the jury charge error resulted in "egregious harm" to the defendant. *Ngo v. State*, 175 S.W.3d 738, 743–744 (Tex. Crim. App. 2005). Under the *Almanza* standard, the record must show that a defendant has suffered actual, rather than merely theoretical, harm from jury charge error. *Id.* at 750.

A. Jury Charge Error

"As a general rule, the instructions must ... conform to allegations in the indictment." *Sanchez v. State*, 376 S.W.3d 767, 773 (Tex. Crim. App. 2012). A jury charge may not enlarge the offense alleged and authorize the jury to convict a defendant on a basis or theory permitted by the jury charge but not alleged in the indictment. *Reed v. State*, 117 S.W.3d 260, 265 (Tex. Crim. App. 2003); *see also Fella v. State*, 573 S.W.2d 548 (Tex. Crim. App. 1978) (holding the trial court erred by authorizing the jury to find the appellant guilty based on a theory not alleged in the indictment). "[T]he indictment [is] the basis for the allegations which must be proved and ... the hypothetically correct jury charge for the case must be authorized by the indictment." *Gollihar v. State*, 46 S.W.3d 243, 245 (Tex. Crim. App. 2001) (quotations omitted). "The law as 'authorized by the indictment' includes the statutory elements of the offense 'as modified by the charging instrument.' " *Daugherty v. State*, 387 S.W.3d 654, 665 (Tex. Crim. App. 2013) (quoting *Curry v. State*, 30 S.W.3d 394, 404 (Tex. Crim. App. 2000)). Thus, "a hypothetically correct jury charge would not simply quote from the controlling statute." *Gollihar*, 46 S.W.3d at 245.

***2** "[W]hen the statute defines alternative manner and means of committing an element and the indictment alleges only one of those methods, 'the law' for purposes of the hypothetically correct charge, is the single method alleged in the indictment." *Id.* "For example, although the State may be permitted to plead multiple statutory manner and means in the charging instrument, it could choose to plead only one." *Thomas v. State*, 444 S.W.3d 4, 8 (Tex. Crim. App. 2014). "However, in so doing, the State is required to prove that the defendant committed the alleged crime using that specific statutory manner and means, and it may not rely on any other statutory manner and means of committing the crime it did not plead in the charging instrument." *Id.*; *cf. Sanchez*, 376 S.W.3d at 774 (holding where the indictment permits alternative manner and means of the commission of the crime, "the State could obtain a conviction if any of the alternatives were proven"). Thus, error exists when "the trial court improperly broaden[s] the indictment" with a jury charge that alleges alternative manner and means that were not pled in the indictment. *Reed*, 117 S.W.3d at 265.

Here, the indictment alleged Ramirez penetrated the complainant's anus with his sexual organ, while the jury charge allowed the jury to convict Ramirez if it found that Ramirez had penetrated the complainant's anus "*by any means*." (emphasis added). The jury charge enlarged the offense alleged and authorized the jury to convict Ramirez on a different theory than the one that was alleged in the indictment. *See id.* Although the jury charge properly quoted the controlling statute, it did not properly quote the elements of the controlling statute as modified by the indictment. The charge could not merely state that Ramirez should be found guilty if he penetrated the complainant's anus *by any means*, when the indictment specifically alleged Ramirez penetrated the complainant's anus *by means of his sexual organ. See Gollihar*, 46 S.W.3d at 245 ("[W]hen the controlling statute lists several alternative acts intended by the defendant and the indictment limits the State's options by alleging certain of those intended acts, the hypothetically correct charge should instruct the jury that it must find one of the intended acts as alleged in the indictment."). In this case, the State chose to only plead penetration by means of Ramirez's sexual organ. Because the State only pled this single manner and means of penetration, it may not rely on any other manner and means of committing the crime that it did not plead in the charging instrument. Therefore, we hold the trial court erred when it improperly broadened the indictment with a jury charge that authorized the jury to convict Ramirez of aggravated sexual assault for penetrating the complainant's anus without her consent by any means.

B. Harm Analysis

"[R]eversal for an unobjected-to erroneous jury instruction is proper only if the error caused actual, egregious harm to an appellant." *Arrington v. State*, 451 S.W.3d 834, 840 (Tex. Crim. App. 2015). "An egregious harm determination must be based on a finding of actual rather than theoretical harm." *Cosio v. State*, 353 S.W.3d 766, 777 (Tex. Crim. App. 2011). A "[j]ury-charge error is egregiously harmful if it affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory." *State v. Ambrose*, 487 S.W.3d 587, 597 (Tex. Crim. App. 2016). When assessing harm based on the particular facts of the case, we consider: "(1) the entirety of the jury charge, (2) the state of the evidence, (3) counsel's arguments, and (4) any other relevant information revealed by the entire trial record." *Id.* at 598.

1. Entirety of the Jury Charge

"A jury charge is fundamentally defective if it authorizes a conviction without requiring the jury to find all the elements of an offense beyond a reasonable doubt." *Sanchez v. State*, 182 S.W.3d 34, 63 (Tex. App.—San Antonio 2005), *aff'd*, 209 S.W.3d 117, 125 (Tex. Crim. App. 2006). "It is now axiomatic that a defendant is to be tried only on the crimes alleged

in the indictment ....” *Abdnor*, 871 S.W.2d at 738; *see also Daugherty*, 387 S.W.3d at 665 (“The law as ‘authorized by the indictment’ includes the statutory elements of the offense ‘as modified by the charging instrument.’ ” (quoting *Curry*, 30 S.W.3d at 404)).

***3** Here, the jury charge, viewed in its entirety, affected the very basis of the case because it allowed jurors to convict Ramirez on the belief that he penetrated the complainant's anus by means other than his sexual organ. The jury charge accurately quoted the statutory elements of the offense. The indictment, however, modified the statutory elements of the applicable law so that the jury should have found Ramirez guilty only if it unanimously believed Ramirez penetrated the complainant's anus with his sexual organ. The jury charge accurately restated the indictment language at the beginning of the instructions. However, the “Relevant Statutes” and “Application of Facts to Law” sections did not require the jury to find penetration of the complainant's anus by Ramirez's sexual organ. Thus, the jury charge, considered in its entirety, improperly broadened the means by which the jury was authorized to convict Ramirez because the charge did not comport with the indictment. This charge error created the significant possibility that Ramirez was convicted without the jury unanimously agreeing on the essential fact that he penetrated the complainant's anus with his sexual organ. *See Abdnor*, 871 S.W.2d at 731 (“[A]n erroneous or an incomplete jury charge jeopardizes a defendant's right to jury trial because it fails to properly guide the jury in its fact-finding function.”).

2. State of the Evidence and Counsel's Arguments

“One of [the] considerations in the determination of egregious harm is whether the error related to a contested issue.” *Hutch v. State*, 922 S.W.2d 166, 172 (Tex. Crim. App. 1996) (quotations omitted). “When the error relates to an incidental defensive theory rather than an obviously contested issue, the harm is less likely to be egregious.” *Hines v. State*, 535 S.W.3d 102, 114 (Tex. App.—Eastland 2017, pet. ref'd).

The record shows the means of penetration was contested throughout the trial. Evidence showed semen was not found in the complainant's anus. The State presented evidence—through the testimony of the complainant—to convince the jury that Ramirez caused the penetration of the complainant's anus with his sexual organ. Ramirez contested this evidence by attesting that he did not penetrate the complainant's anus with his sexual organ. Throughout the trial and closing arguments, Ramirez's counsel specifically argued Ramirez could only be convicted if the jury found that he penetrated the complainant's anus with his sexual organ. The manner and means of penetration was a focal point of counsel's closing argument.

It is apparent from the record that the basis of Ramirez's defensive theory in this case focused on the specific manner and means of penetration. Ramirez presented evidence and built a defensive theory around an indictment that required a conviction to be predicated on a finding of penetration of the complainant's anus by Ramirez's sexual organ. A review of the evidence and counsel's arguments supports the conclusion that Ramirez suffered egregious harm from the erroneous charge because it vitally affected Ramirez's defensive theory. *See Ambrose*, 487 S.W.3d at 597. The jury charge deprived Ramirez of his defensive theory to negate the alleged manner of penetration when the charge did not make the specific manner and means alleged in the indictment an element of the charged offense. In sum, Ramirez's defensive theory was rendered meaningless even though it was a viable theory in light of the evidence.

Because the jury charge affected the very basis of the case and vitally affected Ramirez's defensive theory, we hold the erroneous charge resulted in Ramirez suffering egregious harm. *See Ambrose*, 487 S.W.3d at 597; *see also Lampkin v. State*, 607 S.W.2d 550, 551 (Tex. Crim. App. [Panel Op.] 1980) (holding it is reversible error, even without objection at trial, when the jury charge allows the jury to convict the defendant on a different theory than what was alleged in the indictment).

Ramirez's first issue is sustained.

CONCLUSION

We reverse the judgment of the trial court and remand the cause for a new trial.

All Citations

Not Reported in S.W. Rptr., 2019 WL 3937270

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